

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DARRIS LARRON MORROW,

Defendant-Appellant.

UNPUBLISHED

May 10, 2002

No. 223172

Genesee Circuit Court

LC No. 99-004597-FH

Before: Neff, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his one-day jury trial convictions for possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v) and possession of marijuana, MCL 333.7403(2)(d). He was sentenced as an habitual offender pursuant to MCL 769.12, to a prison term of 3 to 15 years for the cocaine conviction and to concurrent term of 365 days for the marijuana conviction. Both sentences are consecutive to a twelve-month parole violation extension of an existing sentence. We affirm.

On June 3, 1999, at approximately 8:00 p.m., Officers Felix Trevino and Michael Angus of the Flint Police Department were working in plain clothes and in an unmarked car in an area of the city known for its drug activity. While working the area, the officers came upon three people, one on a bike and two on foot, who were observed by the officers handing an item to each other. The officers stopped their car in front of the individuals, and defendant and Bruce Sims started walking east. The other individual rode a bicycle to the west. Officer Trevino then observed defendant drop some off-white rocks from his right hand and start to run. Suspecting the rocks to be crack cocaine, Officer Trevino chased defendant on foot. Officer Trevino apprehended the defendant and recovered the five off-white rocks that defendant had dropped. Testing revealed that at least one of the rocks was cocaine, and therefore Officer Trevino advised defendant that he was under arrest for possession of cocaine, conducted a patdown on defendant, and discovered a baggie filled with a green leafy substance (which testing confirmed was marijuana) in defendant's right-rear pocket.

Before trial, the prosecution moved for an in limine ruling permitting the use of defendant's three previous breaking and entering convictions to impeach defendant, should he testify. The trial court granted the motion pursuant to MRE 609, on the grounds that the probative value of the evidence exceeded the prejudicial effect. During cross-examination of

defendant, the prosecution made reference to defendant's previous convictions. The prosecutor also referred to defendant's previous convictions during his closing argument. Specifically, he stated:

[A]s you review this evidence you're gonna have to judge the credibility of the people who talked to you, and part of judging the credibility of the people is to know what motivation they may have to lie or whether they had a history of dishonesty. Part of what you heard in this case is that there was one witness who has a history of breaking into buildings to commit the crime of larceny, and that is a theft offense, and that demonstrates a certain degree of dishonesty. So when weighing the credibility of the defendant you have to consider that.

Defendant testified that on the day he was arrested, he had been riding "bikes" with Sims, and that they had stopped in the middle of the block to talk to "some guy," who was also riding a bicycle.¹ He then testified that while they all "dispersed" when the police arrived, he did not have cocaine in his hand but that Sims and the other individual had been "making transactions." Defendant also testified that they had been passing around his lighter and that this must have been what the officers had observed.

In rebuttal, the prosecution recalled Officer Trevino. He testified that he was certain that only one person had a bicycle and that that person rode west and was never identified. He also testified that defendant did not have any vehicle at the time of his arrest and that no bicycles were found in the area after defendant's arrest. Officer Trevino further testified that at the time of defendant's arrest, defendant had no hair, whereas Sims had hair. Trevino also believed that the unidentified individual also had hair. Officer Angus also testified that only one of the three people had a bicycle, that that person was not defendant, and that he rode his bicycle to the west when he and Trevino approached. Angus also confirmed that defendant was bald and that Trevino had informed him that he had observed defendant "drop rocks" prior to the chase. He also noted that while he did not personally observe defendant "drop rocks," he did see defendant's hand behind his back. Further, Angus testified that while defendant was bald, loud, and lively, Sims was wearing a baseball hat, and was disoriented or intoxicated at the time of the arrest. Angus also testified that he found rocks of cocaine on Sims wrapped in a folded up lottery ticket, and that Sims did not make any movement with his hands before he was arrested. He also testified that Sims and defendant were five feet apart as they approached the police car.

Following closing arguments and jury instructions, the jury deliberated several hours in the late afternoon and early evening before requesting that Officer Trevino's testimony be replayed.² After rehearing the testimony, the jury returned to the jury room, where it continued to

¹ Defendant's sister, Carolyn Cardwell, and his aunt, Bessie Robinson, also both testified that defendant had ridden Cardwell's bicycle on a couple of occasions in early June. Cardwell also testified that she had not seen her bicycle since defendant last used it.

² It also appears from the record that as of that time the jury had already reached its decision regarding the marijuana possession charge.

deliberate for another hour before returning a verdict finding defendant guilty as charged. Subsequently, the trial court held a sentencing hearing in which it sentenced defendant to concurrent prison terms of 365 days for the marijuana conviction and three to fifteen years for the fourth habitual offender cocaine conviction, to be served at the completion of twelve month parole violation extension.

I

Defendant first argues that the trial court abused its discretion when it ruled that prosecutor could use defendant's three previous breaking and entering convictions for impeachment purposes. We disagree. The decision to allow impeachment with prior convictions is an evidentiary issue within the sound discretion of the trial court. *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992); see also *People v Wess*, 235 Mich App 241, 247; 597 NW2d 215 (1999). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would say that there is no justification or excuse for the trial court's decision. *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999); *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

A witness' credibility may be impeached with his or her prior convictions, provided the convictions satisfy the criteria established by our Supreme Court in *People v Allen*, 429 Mich 558, 564, 605-606; 420 NW2d 499, amended *People v Pedrin*, 429 Mich 1216 (1988), and set forth in MRE 609. See also MCL 600.2159. In *Allen*, the Supreme Court held that evidence of crimes containing elements of dishonesty or false statement is admissible without any further consideration by the trial court. If the crime did not contain elements of dishonesty or false statement but did contain an element of theft, the crime was punishable by more than one year's imprisonment, and the probative value of the evidence outweighs its prejudicial effect, then the trial judge may admit the evidence. All other prior convictions are inadmissible for the purpose of impeachment under MRE 609. *Id.* at 605-606.

The prosecution impeached defendant by using his prior breaking and entering convictions. Defendant concedes that the convictions were theft offenses punishable by more than one year, MRE 609(a)(2)(A), and that the convictions occurred within ten years of their introduction as evidence. MRE 609(c). However, defendant maintains that the prejudicial effect of admitting the prior convictions for impeachment outweighed their probative value. See MRE 609(a)(2)(B). We disagree.

MRE 609(b) provides in relevant part:

For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity

In the present case, defendant was charged with two drug offenses. Quite obviously, the charged drug offenses were not similar to the crimes of breaking and entering which resulted in

defendant's previous convictions; thus the probative value of the evidence of these prior theft convictions outweighs any prejudicial effect, *Allen, supra* at 606, and the trial court did not abuse its discretion when it permitted the prosecutor to introduce this evidence for impeachment. *Nelson, supra; Ullah, supra.*

II

Defendant also claims that during closing arguments the prosecutor denied him a fair and impartial trial by improperly arguing that defendant's prior convictions were evidence of his propensity to commit the charged offenses. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Because defendant did not object to the prosecutor's alleged misconduct at trial, this issue has not been properly preserved for appeal, *People v Dixon*, 217 Mich App 400, 407; 552 NW2d 663 (1996), and will therefore only be reviewed for plain error, *People v Schutte*, 240 Mich App 713, 718; 613 NW2d 370 (2000), which must have affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). In order for defendant's substantial rights to have been affected, there must be a showing of prejudice or that the error was outcome determinative. *Id.*

We find no plain error in this case. The prosecutor merely argued that because defendant has a history of dishonesty, as demonstrated by his prior breaking and entering convictions, defendant's testimony was not believable. Thus, the prosecutor statements were not improper and no error occurred. See *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999); *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997); see also *People v Schultz*, 246 Mich App 695, 712; 635 NW2d 491 (2001).

III

Defendant next contends that the trial court erred by permitting Officer Angus to testify during rebuttal, when the subject matter of his testimony should have been presented during the prosecutor's case-in chief. Defendant also argues that the trial court erred by permitting Officer Trevino to repeat his initial testimony during rebuttal. Again, since defendant did not object below in either instance he has failed to preserve the issue for appeal, *People v Wilson*, 196 Mich App 604, 616, n 9; 493 NW2d 471 (1992), and we will only review the claims for plain error. *Carines, supra.* The officers' testimony was introduced to contradict and refute defendant's testimony, and therefore was proper rebuttal. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). Thus, whether the testimony could have been introduced in the prosecution's case-in-chief is irrelevant, *id.*; *People v Pesquera*, 244 Mich App 305; 314-315; 625 NW2d 407 (2001), and the trial court did not err in permitting the rebuttal testimony. *Carines, supra.*

IV

We are also not persuaded by defendant's unpreserved argument that the trial court coerced a jury verdict by allowing the jury to deliberate until 8:03 p.m. Claims of jury coercion are reviewed on a case-by-case basis in order to determine whether, based on the facts and circumstances of the particular case, the defendant was denied a fair trial. *People v Turner*, 213 Mich App 558, 583; 540 NW2d 728 (1995).

Here, jury selection began at 9:10 a.m. and the jury returned its verdict at 8:03 p.m., ten hours and fifty-three minutes after the start of jury selection. All proofs were finished at 4:03 p.m., and following closing arguments and jury instructions, jury deliberations began at 4:38 p.m. During its deliberations, the jury requested to hear Officer Trevino's testimony, which was played for the jury from 7:01 p.m. to 7:48 p.m., and then, after deliberating for another fifteen minutes, the jury returned its verdict of guilty as charged at 8:03 p.m. Further, the trial court instructed the jury in accordance with CJI 3.11, see *People v Pollack*, 448 Mich 376, 386; 531 NW2d 159 (1995), and nothing in the record suggests that the trial court required the jury to deliberate for any particular length of time or that the jury requested or was opposed to staying into the evening in order to reach a verdict. Cf. *People v Hardin*, 421 Mich 296, 316; 365 NW2d 101 (1984). Indeed, the record indicates that the jury had reached its verdict with regard to the marijuana possession charge before requesting that Officer Trevino's testimony be heard and that, after the testimony was heard, deliberations only continued for another fifteen minutes before rendering its verdict. Because these facts do not suggest jury coercion, the trial court did not err when it permitted the jury to deliberate into the evening. Compare *People v Younger*, 380 Mich 678, 685; 158 NW2d 493 (1968) (reversal not warranted even though jury was held for sixteen hours and deliberated until 1:00 a.m.) and *People v Cadle*, 204 Mich App 646, 658; 516 NW2d 520 (1994), rev'd on other grounds *People v Perry*, 460 Mich 55; 594 NW2d 477 (1999) (jury deliberation from 5:50 until 9:40 not unreasonable).

V

Defendant further contends that because his prior convictions occurred before MCL 769.13 was amended by 1994 PA 110, the trial court erred when it sentenced defendant as an habitual offender without a trial on his prior convictions. Notwithstanding this argument, made without reference to any precedential authority,³ *People v Williams*, 215 Mich App 234, 236; 544 NW2d 480 (1996) held that a defendant is not "entitled to an adversarial hearing before the prior convictions are used for sentencing purposes." See also *People v Eason*, 435 Mich 228, 250; 450 NW2d 17 (1990). In addition, *People v Zinn*, 217 Mich App 340, 344-345 551 NW2d 704 (1996), made clear that when a defendant is charged with a crime after May 1, 1994, that defendant "is longer entitled to a jury trial" before the court uses prior convictions to enhance a defendant's sentence under the habitual offender statutes, MCL 769.10; 769.11; 769.12. Further, the Legislature directed that the amendment "shall apply to prosecutions for criminal offenses on or after that date." 1994 PA 110, § 2. Here, defendant was prosecuted for criminal offenses that occurred on June 3, 1999, which, obviously, took place after May 1, 1994. Defendant was also provided notice of the prosecution's intent to seek enhancement of defendant's sentence and

³ Defendant relied on *People v Truss*, unpublished opinion per curiam of the Court of Appeals, issued March 4, 1997 (Docket No. 191384) for the proposition that the trial court erred when it applied MCL 769.13, as amended by 1994 PA 110, to the instant case; however, that case, specifically indicated that the defendant was tried for a "criminal offense [that] took place on April 17, 1994." *Id.*, slip op, p 2. Here, defendant's trial arose out of criminal offenses that occurred on June 3, 1999. Accordingly, this unpublished opinion does nothing to bolster defendant's argument here. Instead, it reaffirms our conclusion that 1994 PA 110 applies to all cases brought after May 1, 1994.

“given an opportunity to deny, explain, or refute any evidence or information pertaining to the defendant's prior conviction[s] . . . before sentence [was] imposed,” MCL 769.13(6); MCR 6.425(D)(2)(a),(b). Thus, the procedure followed in this case complied with MCL 769.13 and with MCR 6.425(D). See also *People v Green*, 228 Mich App 684, 698-699; 580 NW2d 444 (1998); *Williams*, *supra*.

VI

Finally, defendant claims that because his counsel failed to object (1) to the prosecutor's closing argument; (2) to the rebuttal testimony of the officers; (3) to the jury's late-night deliberations; and (4) to defendant's sentence as a habitual offender, he was denied effective assistance of counsel. Defendant also argues that defense counsel's failure to take sufficient action to produce Sims as a defense witness was ineffective. Defendant did not move for a *Ginther*⁴ hearing or new trial below, therefore our review of this issue is limited to errors apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). With regard to defendant first four allegations of ineffective assistance, we have already found that the prosecutor's closing argument was not misconduct, and that the trial court's decisions regarding rebuttal testimony, jury deliberations, and sentencing were not error. Because counsel is not required to advocate positions that have no merit, *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), his failure to object to these issues at trial did not constitute ineffective assistance of counsel.

Likewise, after reviewing the record before us, we also find that defendant's fifth allegation of ineffective assistance (i.e., failure to produce Sims as a witness) is without merit. In order to establish ineffective assistance of counsel, a defendant must, amount other things, establish that counsel's deficiency was so prejudicial that the defendant was deprived of a fair trial. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). To prove this, a defendant must show that there is a reasonable probability that but for counsel's unprofessional error, the trial outcome would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Defendant cannot establish that the trial outcome would have been different without demonstrating, at a minimum, how Sims' testimony would have been helpful to defendant's case. See *People v Mitchell*, 454 Mich 145, 168-169; 560 NW2d 600 (1997); *People v Michael Williams*, 391 Mich 832 (1974). Because defendant provides no evidence to this effect, he has failed to overcome the presumption that counsel was effective, see *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001); *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999), or to establish that the testimony of Sims would have caused the outcome of the trial to be undermined, *Pickens*, *supra* at 327. Thus, defendant's ineffective assistance claim must fail. *Strickland*, *supra* at 687, 697; *Toma*, *supra*.

⁴ *People v Ginther*, 390 Mich 436, 443 212 NW2d 922 (1973).

Affirmed.

/s/ Janet T. Neff
/s/ Kurtis T. Wilder
/s/ Jessica R. Cooper